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IN THE

# Supreme Court of the United States

No. 420

COLEMAN ULLNER,

*Appellant*,

v.

THE STATE OF OHIO,

*Appellee*.

ON APPEAL FROM THE SUPREME COURT OF OHIO

## BRIEF OF OHIO CIVIL LIBERTIES UNION AND AMERICAN CIVIL LIBERTIES UNION, *AMICI CURIAE*, IN SUPPORT OF JURISDICTION


MORTON B. LOVE
The Leader Building
Cleveland 14, Ohio

ALAN U. SCHWARTZ
ROWLAND WATTS
c/o American Civil Liberties Union
170 Fifth Avenue
New York 10, N. Y.

*Attorneys for Amici Curiae*

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IN THE

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No. 426

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—v.—

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ON APPEAL FROM THE SUPREME COURT OF OHIO

## BRIEF OF OHIO CIVIL LIBERTIES UNION AND AMERICAN CIVIL LIBERTIES UNION, *AMICI CURIAE*, IN SUPPORT OF JURISDICTION

### Interest of *Amici*

The Ohio Civil Liberties Union and the American Civil Liberties Union, appearing herein as *amici curiae* with the consent of both the parties filed with the Clerk of this Court, are non-profit, non-partisan organizations dedicated to the advancement of the constitutional rights of all people in the United States. The American Civil Liberties Union functions through a national organization, twenty-four state or local affiliates, and representatives in all of the remaining states. The Ohio Civil Liberties Union is a state affiliate of the American Civil Liberties Union.

The issues presented in this case now being considered by the Court on the question of jurisdiction are, of all those involving federal constitutional rights, among the most recurrent and vexing to arise locally in all parts of the country.

*Amici* believe that this case involves an abridgment of one of the most fundamental of these rights, that of religious liberty; and an infringement upon one of the most fundamental of the constitutional prohibitions, that against making of laws concerning the establishment of religion.

Because the Court has refused for over fifty years[1] to accept jurisdiction to review the validity of the numerous and discriminatory state laws and municipal ordinances placing restrictions and prohibitions upon activities for both business and pleasure that may be engaged in on the predominantly observed Christian Sabbath, Sunday, there has arisen numerous prosecutions and other legal actions in the various states and in the lower federal courts[2] in which the federal constitutional questions are raised but left unresolved.

*Amici* respectfully suggests that the accepting of jurisdiction and the review by the Court of this case,[3] by defining (at least in part) the limits that the Constitution places upon State powers to control otherwise lawful activities that may be pursued on Sunday, will apprise both the States and their residents of their rights and thereby have the additional salutary result of a substantial reduction of litigation.

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[1] Most recently in *Grochowiak* v. *Pennsylvania*, No. 166, October Term, 1958, appeal dismissed October 13, 1958, rehearing denied November 24, 1958.

[2] On November 22, 1958, an order temporarily restraining the District Attorney of Lehigh County from enforcing the laws prohibiting sales on Sunday was issued by the U. S. District Court "pending convening of a three-judge court and issuance of its order, or until further order of this court." This restraining order was dismissed on November 25, 1958, but an appeal is pending. *Two Guys from Harrison—Allentown, Inc.* v. *Paul A. McGinley*, Civil Action No. 25626, U. S. D. C., E. D. Pa.

[3] Also pending before the Court on a Jurisdictional Statement requesting review of the final decision of the Supreme Court of Ohio is *Kidd* and *Mills* v. *Ohio*, No. 465, October Term, 1958.

## Argument

Jurisdiction in this case is sought in order to test the constitutionality of Section 3773.24 of the Revised Code of Ohio. That statute requires persons over the age of 14 years who are engaged in unexcepted trades to observe Sunday as the day of rest and to refrain from conducting their businesses on that day. The section does not apply to work of "necessity or charity" and does not extend to persons who "conscientiously" observe the seventh day of the week as the "Sabbath" and abstain thereon from doing things prohibited on Sunday. The facts in the case are adequately set forth in appellant's Jurisdictional Statement as are the relevant statutory provisions. They shall not be repeated here.

The plain effect of this statute, as construed by the court below, is to require persons engaged in certain retail trades who observe a day other than Saturday or Sunday as their Sabbath to refrain from engaging in their trade two days each week, while other persons whose religion commands them to observe either Sunday or Saturday as their Sabbath are required to close their business only one day each week.

### I. The constitutionality of Section 3773.24 as construed by the court below raises a substantial question of federal constitutional law under the First and Fourteenth Amendments of the United States Constitution and should be reviewed by this Court.

This Court need hardly be reminded of its constant adherence to the principle that the Fourteenth Amendment to the United States Constitution, including as it does the guarantees of religious freedom contained in the First Amendment, has erected a "wall of separation between

church and state." This adherence has been over the years a cornerstone of our religious liberties. As stated by this Court in *Everson* v. *Board of Education*, 330 U. S. 1, 15 (1946),

> "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. . . . No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. . . . Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. . . . "

(See also *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624 (1943), *Murdock* v. *Pennsylvania*, 319 U. S. 105 (1943), and the recent case of *First Unitarian Church* v. *Los Angeles*, —— U. S. ——, 2 L. Ed. 2d, 1484 (1958).)

The statute under consideration prohibits most people in Ohio from working on Sunday. It excepts from this prohibition works of "necessity and charity," never clearly defined, and it excepts those people whose conscientious religious beliefs prevent them from working on Saturday.[4] It makes no provision for those people whose religious beliefs require them to rest on a day other than Saturday

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[4] The most recent statistics concerning the leading religious faiths in the United States which observe Saturday as the Sabbath show: Jewish congregations—5,500,000; Seventh Day Adventists—291,567; Seventh Day Baptists (General Conference)—5,965; The Church of God (Seventh Day), Denver, Colorado—4,300; and Church of God (Seventh Day)—2,000. *Yearbook of American Churches*, Edition for 1959. National Council of Churches of Christ in the U. S. A., New York.

or Sunday, and it makes no provision for those whose principles do not require any day of rest. It, therefore, forces both these latter groups to refrain from work on Sunday.

Many of our citizens belong to religious groups which require them to refrain from work on days other than Saturday and Sunday.[3] The effect of RC Section 3773.24 is clear. Since the statute forces them to refrain from working on Sunday and their religion requires them not to work on another day, they are limited to five days a week in which to earn their bread. On the other hand, those whose day of religious observance happens to coincide with the provisions of the statute are allowed to work six days a week. The same is true for those who have no formal religious belief. Thus the discrimination which results from an application of this statute is made clear. It is precisely the same as if the state had passed the statute saying that the people of "X" religion or the people of no religion were allowed to work six days a week while the people of "Y" religion were allowed to work but five. It is clear that under the opinions of this Court, cited above, and the many others cited by appellant, such a statute would be declared unconstitutional as violative of the Fourteenth Amendment. Such a result must apply here as well. The economic discrimination which results from an application of the statute in question clearly aids the people of one religious group over those of another by giving the former an advantage in their pursuit of economic gain. In essence, the state is imposing a serious financial obstacle in the path of free exercise of an individual's religious beliefs. This it cannot do. As was said by this Court in *Murdock* v. *Pennsylvania, supra* (p. 113), "A state may not impose a

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[3] For example, according to the *Islamic* Center, Washington, D. C., there are approximately 70,000 Moslems in the United States who observe Friday as their Sabbath.

charge for the enjoyment of a right granted by the Federal Constitution."

Notwithstanding the fact that Section 3773.24 so clearly violates the guarantees of religious freedom contained in both the First and Fourteenth Amendments to the Constitution, the respondent contends that it should be upheld as a proper exercise of the state's police power in support of the public welfare. In short, respondent claims that the statute has nothing to do with religion but is merely an attempt by the state to insure that its citizens get a certain amount of rest each week. They say this in the face of historical research which clearly indicates the religious basis of Sunday legislation. See Chapters XIX and XX, *Separation of Church and State in the United States,* Johnson and Yost, University of Minnesota Press, 1948. Moreover, they could say this in the face of a clear recognition by courts themselves of the religious basis of Sunday legislation. See, for example, the statement of the Supreme Court of Georgia as quoted in *Hennington* v. *State of Georgia,* 163 U. S. 166 (1896):

> "With respect to the selection of the particular day in each week which has been set apart by our statute as the rest day of the people, religious views and feelings may have had a controlling influence. We doubt not that they did have; and it is probable that the same views and feelings had a very powerful influence in dictating the policy of setting apart any day whatever as a day of enforced rest."

Indeed, the purely religious nature of the statute in question can be seen most clearly from an examination of its companion statutes in Ohio. Ohio Revised Code 3773.23 prohibits among other things theatrical and dramatic exhibits on Sunday and baseball playing and motion pictures in the forenoon on that day. Ohio Revised Code 3773.25

forbids on Sunday sporting, hunting, fishing or shooting, among other things. It is clear from these particular prohibitions that rest from toil was not the main object of these statutes. Not even respondents would claim that seeing a play or a movie, or playing baseball is "work" detrimental to the health of the citizenry. The plain fact is that these Sunday prohibitions were enacted to prevent activity on Sunday which would detract from its significance as a day of worship. It is certainly in keeping with this conclusion to note that the statute in question was originally entitled "Sabbath Desecration."

Moreover, even assuming that there were no religious basis for the statute in question, it cannot be denied, as shown above, that the application of this statute results in religious discrimination. It is claimed by respondent that such discrimination is outweighed by the beneficial effects of the statute, namely, the improvement of the public health and welfare. And yet there is no substantial relation between the statute and its purported objective. As is clear from appellant's brief and is undenied by respondent, Section 3773.24 and its companions have been more honored in their breach than in their observance.

There is no reason to suppose that in the present day all those who shop on Sunday or do business on Sunday are endangering their health. In fact, these statutes were passed at a time when states had not yet regulated the number of hours a person might properly work in any given day or week. Society has changed a great deal since those times and today, due in large measure to decisions of this Court, states can regulate and have regulated the length of time within which it is deemed healthful for a man to work. It need hardly be added that these regulations are substantially related to the public health. It also need hardly be added that these regulations are concerned with rest from toil and not with particular days of rest.

It is not contended either by appellant or by *amici* that the State of Ohio or any other state could not so regulate the number of hours per week within which a man might work. It is contended, however, that there is no substantial relation between such a health measure and the insistence by a state that people take their rest on one particular day as opposed to any other. As was stated by this Court in *Hennington* v. *State of Georgia, supra,* p. 304,

> "The well settled rule is that if a statute purporting to have been enacted to protect the public health, the public morals, or the public safety has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge and thereby give effect to the Constitution."

Not only does the statute under consideration, specifying as it does a particular day of the week upon which people must rest, have no real relation to such objects, it is in addition a clear invasion of "rights secured by the fundamental law" and it, therefore, should be declared unconstitutional.

**II. The frequency of this question, the confused application of statutes such as this, and the increased difficulty of their enforceability make necessary a present consideration of the merits by this Court.**

As is clear from the Appendix hereto and from an examination of Appellant's brief, more than half of the states of this Union have Sunday laws similar to the statute under consideration. Attached to these statutes are specific exceptions of various kinds, most of which have no real relation to the articulated purpose of the statutes and are rather the result of activity by private pressure groups.

In some instances, these statutory exceptions have been struck down on the grounds that they result in unreasonable discrimination. (See, for example, *Henderson* v. *Antonacci*, 62 S. 2nd 5 (1952), and *Kelley* v. *Blackburn*, 95 S. 2nd 260.) In most instances, however, state courts have refused to grant non-Sunday worshipers relief from the discriminatory provisions of state statutes.

As can be seen from an article in Time Magazine of October 22, 1956, Vol. LXVIII, No. 17, page 98, there is at present a widespread national non-observance of much of this Sunday legislation. Such general non-observance indicates both a dissatisfaction with the principles behind such legislation and a clear lack of connection between these laws and the public health. Despite the changed times in which we now live and despite the current prevalence of laws regulating work which are not based upon religion, this Court has not considered the merits of the constitutionality of these Sunday laws for 58 years. See *Petit* v. *Minnesota*, 177 U. S. 164 (1900). There has therefore been nurtured an anachronism in the law which is no longer of benefit to the community and which violates fundamental constitutional rights.

This Court has often exercised its power of review over constitutional questions which have been the subject of recurrent litigation in courts below and which must be reexamined in the light of the present. (See *Brown* v. *Board of Education*, 347 U. S. 483 (1954), *Teamsters Union* v. *Vogt, Inc.*, 354 U. S. 284 (1957), and many others cited by appellant's brief.) In like manner, the instant case, involving as it does the vital right to freedom of religion, is a worthy and important object of the Court's attention.

## CONCLUSION

Section 3773.24 of the Revised Code of Ohio is a clear violation of the constitutional provisions guaranteeing freedom of religion. Its application results in an illegal discrimination between people of different religious sects. It has no substantial relation to the valid police power of the state. Because of the overriding importance of the principle involved, this Court should reexamine the constitutionality of this statute in the light of recent cases and recent times, and thereby assure to the people the continued protection of their Constitution.

Respectfully submitted,

MORTON B. ICOVE
The Leader Building
Cleveland 14, Ohio

ALAN U. SCHWARTZ
ROWLAND WATTS
c/o American Civil Liberties Union
170 Fifth Avenue
New York 10, N. Y.

*Attorneys for Amici Curiae*

## APPENDIX

### Survey of Sunday Observance Laws

A preliminary survey made by the American Civil Liberties Union through its affiliates and state correspondents produced information concerning Sunday laws in twenty-seven states. If the Court accepts jurisdiction, *amici* hope to submit a more comprehensive survey of the laws of all forty-eight states. A sampling of these laws now, however, may be useful.

1. States which prohibit all work[1] on Sunday except that of "necessity or charity" (or equivalent exceptions):

a. without exempting individuals who observe Saturday as the Sabbath:

| | |
|---|---|
| Connecticut | Nebraska |
| Colorado | New Hampshire |
| Florida | Pennsylvania |
| Louisiana | Rhode Island |
| Minnesota | Tennessee |

b. exempting individuals who observe Saturday as the Sabbath:[2]

| | |
|---|---|
| Indiana | New Jersey (in part) |
| Massachusetts | West Virginia |

c. exempting individuals who observe a day other than Saturday or Sunday as the Sabbath:[3]

| | |
|---|---|
| Kentucky | Texas |
| North Dakota | |

[1] All state laws examined have incorporated numerous exceptions ranging from antique selling in Connecticut to a total of approximately ninety in Massachusetts.

[2] To come within this exemption, the person must "conscientiously" observe his Sabbath.

[3] See Footnote 2.

2. A few of the activities variously prohibited on Sunday without regard to the Sabbath day observed:[4]

a. Professional Sports

Boxing
Wrestling
Horse Racing
Billiards
Football
Baseball
Ice Hockey
Cock-fighting

b. Retail Occupations

Automobile Sales
Tobacco Selling
Cleaning and Dyeing
Bootblacking
Barbering
General Selling
Public Auctions
Alcoholic Beverage Selling

c. Recreational Activities

Public Dancing
Theatrical Performances
Motion Pictures
Hunting
Sport Generally
Cards and Games of any Kind

3. States which have no Sunday observance laws:

California (except for boxing)
Illinois
Utah

[4] But some of these are prohibited during specified hours only in some states.